Supreme Court, U. S.
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80-211

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

LYNN JOHNSTON, Petitioner,

v.

UNITED STATES OF AMERICA,
JAMES F. DOWLING, SPECIAL AGENT,
INTERNAL REVENUE SERVICE,
FEMINISTS FEDERAL CREDIT UNION,
ANN ARBOR CO-OP CREDIT UNION,
HURON VALLEY NATIONAL BANK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Lynn Johnston
13325 Unadilla Road
Unadilla, Michigan 48137

Petitioner, pro se

QUESTIONS PRESENTED FOR REVIEW

I. THE FOURTH AMENDMENT WARRANT QUESTION

In view of what petitioner will present here, especially §32 of the Act of March 3, 1791, chapter 15, 1 Stat. 199, 207, and §10 of the Act of March 3, 1815, chapter 100, 3 Stat. 239, 241 does 26 USC §7602 violate the Fourth Amendment of the United States Constitution?

II. THE VEXATIOUS PROSECUTION QUESTION

Is it a violation of 28 USC §1927 for a government attorney to commence six separate proceedings under 26 USC §7602 involving the same party.

No.

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NOW COMES Miss Lynn Johnston, above named Petitioner, to petition this Honorable Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the 6th Circuit in this case as entered on the 23rd of May, 1980.

As grounds Petitioner Johnston respectfully shows the Court as follows:

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the 6th Circuit has not yet been reported; a copy is set forth in the appendix, page A1. The opinions of the Federal District Courts are unreported and copies of those opinions are also set forth starting on page A3.

JURISDICTION

The judgment of the Court of Appeals was entered on the 23rd of May, 1980 and was issued as Mandate on the 23rd of June, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1), which confers authority for this Court to review any lower court case upon the petition of any party; and under the United States Constitution, the First Amendment, which acknowledges the right to seek redress of grievances by petitioning the Government.

APPLICABLE LAW

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

26 U.S.C. §7602

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to per-

form the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

26 U.S.C. §7604(a)

(a) Jurisdiction of District Court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

26 U.S.C. §7609 (b)(1)

(b) Right To Intervene; Right To Stay Compliance.—

(1) Intervention.—Notwithstanding any other law or rule of law, any person who is entitled to notice a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

28 U.S.C. §1927

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

STATEMENT OF THE CASE

On July 9, 1979 the United States of America and James F. Dowling, Special Agent of IRS commenced four separate "summons" enforcement proceedings under 26 USC §7602, in the Federal District Court, Eastern District, Southern Division for the procurement of any financial records of the petitioner held at Huron Valley National Bank, Feminist Federal Credit Union, Ann Arbor Co-Op Credit Union and A-J Technical Credit Union (the first three are respondents here in A-J Technical Credit Union is currently pending in the lower court). On October 25, 1979 two more like actions were commenced seperately in the Federal District Court, Eastern District, Western Division for the procurement of any 1975, 1976 or 1977 financial records of the petitioner held at Michigan Bell Telephone Employees Credit Union or at Old Kent Bank and Trust Company (also pending below). Petitioner intervened under 26 USC §7609 (b)(1) to stay compliance in each case by Motion to Intervene with Brief and Affidavit claiming Fourth Amendment violations and Bad Faith activities on the part of government agents involving the First and Ninth Amendment Rights of the petitioner. In each of the three cases the District Courts entered orders enforcing Internal Revenue Service "summonses" against petitioner and respondent financial institutions without any hearing being scheduled for an evaluation of the petitioner's proofs of bad faith, neither as to the testimony of witnesses, nor documentation. Petitioner claimed a timely appeal to the Sixth Circuit Court of Appeals for each case seperately and filed (January 7th, 1980) briefs (oral arguments requested) and appendices for each case separately before her motion for consolidation was granted. The United States did not file any brief in the Sixth Circuit despite having from January 7 to May 23, 1980 to do so. They instead motioned for a remand to the District Court on March 7, 1980. On May 23, 1980 the Sixth Circuit denied the government's motion and affirmed the orders of the three District Courts. This petition follows.

ARGUMENT I

Petitioner Johnston very respectfully submits that since this Honorable Court has not seen the research regarding the search and seizure sections of the Internal Revenue System in 1791-

1802 and 1813-1817 and pre-1760 Acts of Parliament that very great errors have occurred regarding the Fourth Amendment in revenue cases.

THE INTERNAL REVENUE ENFORCEMENT SYSTEM, 1791-1802

In September, 1789 the 12 proposed amendments to the Constitution were sent to the several State Legislatures. 1 Stat. 97-98. On January 9, 1790, Alexander Hamilton, member of the 1787 Federal Convention, member of the 1788 New York Ratifying Convention, co-author of the Federalist Papers, New York lawyer, and first Secretary of the Treasury submitted his famous Report on Public Credit to the House of Representatives. 6 Papers of Alexander Hamilton (hereafter PAH) 51, American State Papers, (hereafter ASP), Finance, Vol. 1, p. 15. Accompanying the report was Hamilton's proposed bill for raising additional revenue from domestic distilled spirits and imported spirits. 6 PAH, at 138. (the bill unfortunately does **not** appear in the ASP).

§35 of Hamilton's bill reads:

> "And be it further enacted, that in case any of the said spirits shall be fraudulently deposited, hid or concealed in any place whatsoever, with intent to evade the duties hereby imposed upon them, they shall be forfeited. And for the better discovery of any such spirits so fraudulently deposited, hid, or concealed, it shall be lawful for any Inspector of the revenue, or of any Judge of any Court of the United States, or either of them, or for any Justice of the peace, upon **reasonable cause of suspicion,** to be made out to the satisfaction of such Inspector, Judge or Justice, by the **oath, or,** in the case of a known Quaker, by **affirmation,** of any person or persons, by **special warrant or warrants** under their respective hands and seals, to authorise any of the officers of inspection, by day or night, but if in the night time, in the presence of a constable or other officer of the peace, to enter into all and every such place and places, in which any of the said spirits shall be suspected to be so frausulently depoisted, hid or concealed, and to seize and carry away any of the said spirits which shall be there found, so fraudulently deposited, hid or concealed, as forfeited." 6 PAH, at 154-155 (emphasis added)

§42 of Hamilton's bill reads:

"And to the end that wanton and oppressive seizures may be effectually restrained, and that the owners and importers of spirits, may suffer no improper damage or burthen;

XLII. Be if further enacted, That in any prosecution or action which may be brought against any Inspector or other officer of Inspection for any seizure by him made, it shall be necessary for such Inspector or Officer to justify himself by making it appear, that there was **probable cause** for making the said seizure, upon which, and not otherwise, a verdict shall pass in his favor. And in every such action or prosecution, or in any action or prosecution which may be brought against such inspector or other officer, for irregular or improper conduct in the execution of his duty, the **trial shall be by jury**. And in any action for a seizure, in which a verdict shall pass for such inspector, the **jury** shall nevertheless assess reasonable damages for any prejudice or waste (according to the true amount in value thereof) which shall be shewn by good proof to have happened to the spirits seized, in consequence of such seizure, and also for the detention of the same, at the rate of six per cent, per annum, on the true value of the said spirits, at the time of such seizure, from that time to the time of restoration thereof, which shall be paid out of the treasury of the United States; provided that no damages shall be assessed when the seizure was made for want of the proper certificate or certificates or by reason of a refusal to shew any officer of inspection upon his request the spirits in any entered house, or other building or place." 6 PAH, at 158-159. (emphasis added).

In the report, Secretary Hamilton said, in relevant part:

"It will not escape the observation of the House, that the Secretary, in the plan submitted, has taken the most scrupulous care, that those citizens upon whom it is immediately to operate, be secure from every species of injury by the misconduct of the officers to be employed. There are not only strong guards against their being guilty of abuses of authority; they are not only punishable, criminally, for any they may commit, and made answerable in damages, to individuals, for whatever prejudice these may sustain by their acts or neglects: But even where seizures are made with **probable cause**, if there be an acquittal of the article seized, a compensation to the proprietors for the injury their property may suffer, and even for its detention, is to be made out of the public treasury." 6 PAH, at 104, ASP, Fi-

nance, Vol. 1 at 24. (emphasis added).

Hamilton's bill was introduced May 5, 1790 (as HR 62, Documentary History of the First Federal Congress of the United States of America, ed. Linda Grant De Pauw Vol. 1, Senate Legislative Journal, p. 731) but failed to make progress. The bill was again introduced on December 30, 1790. Ibid. at 736. The bill became law—Act of March 3, 1791, ch. 15, 1 Stat. 199. (1791 Distilled Spirits Act)

§32 of the Act reads:

"That in case of the said spirits shall be fraudulently deposited, hid or concealed in any place whatsoever, with intent to evade the duties thereby imposed upon them, they shall be forfeited. And for the better discovery of any such spirits so fraudulently deposited, hid or concealed, it shall be lawful for any judge of any court of the United States, or either of them, or for any justice of the peace, upon **reasonable cause of suspicion**, to be made out to the satisfaction of such judge or justice, by the **oath or affirmation** of any person or persons, by **special warrant** or **warrants** under their respective hands and seals, to authorize any of the officers of inspection, by day, in the presence of a constable or other officer of the peace, to enter into all and every such place or places in which any of the said spirits shall be suspected to be so fraudulently deposited, hid or concealed, and to seize and carry away any of said spirits which shall be there found so fraudulently deposited, hid or concealed, as forfeited. 1 Stat. at 207 (emphasis added).

§38 of the Act reads:

"That in any prosecution or action which may be brought against any supervisor or other officer of inspection, for any seizure by him made, it shall be necessary for such supervisor or officer to justify himself by making it appear that there was **probable cause** for making the said seizure; upon which, **and not otherwise**, a verdict shall pass in his favour. And in any such action or prosecution, or in any action or prosecution which may be brought against such supervisor or other officer, for irregular or improper conduct in the execution of his duty, **the trial shall be by jury**. And in any action for a seizure, in which a verdict shall pass for such officer, the **jury** shall nevertheless assess reasonable damages for any prejudice or waste (according to the true amount in value

thereof) which shall be shown by good proof to have happened to the spirits seized, in consequence of such seizure; and also for the detention of the same, at the rate of six per cent per annum, on the true value of the said spirits at the time of such seizure, from that time to the time of restoration thereof; which shall be paid out of the treasury of the United States; Provided, That no damages shall be assessed when the seizure was made for want of the proper certificate of certificates, or by reason of a refusal to show any officer of inspection, upon his request, the spirits in any entered house, building or place: And provided also, That if it shall appear from the verdict of the jury, that any such prejudice or waste was sustained by the negligence of the officer, he shall be responsible therefor to the United States." 1 Stat. at 208. (emphasis added)

INTERNAL REVENUE ENFORCEMENT SYSTEM, 1813-1817

In a letter of November 19, 1814 from Secretary of the Treasury A. J. Dallas to Representative J.W. Eppes, Chairman of the House Committee of Ways and Means replied Secretary Dallas to the Committee's request for "any information which the Treasury Department can furnish, as to the defects of the present revenue laws, and the best mode of correcting the evils arising from an intercourse with the enemy" American State Papers, Finance, Vol. 2, p. 881. The letter reads in relevant part:

"I. The representatives from Vermont present various causes of complaint:*** ***

3. That, limited (as the general powers of the revenue officers appear to be, they are rendered still more inadequate by the terror which the officers now feel, of being exposed to suits for damages, under the authority of recent decisions in the courts of law: for it has been adjudged in Vermont, that the inspectors of the customs are not authorized, in any case, to make seizures, and that actions may be maintained against them, to recover the whole value of the property seized, even when the property itself has been duly condemned, as forfeited by law." Ibid.

Among Secretary Dallas' suggestions was the following:

"2. The officers of the customs should be entitled, in proper cases, and on profer proofs, to obtain, from any magistrate,

a warrant to search dwelling houses, and other buildings; to demand the assistance of the marshal of the district, and his deputies, with the posse of the district, if necessary, for the execution of their duties; and to hold any person to security for his good behavior, stating, on oath that they have probable and just cause for believing that such person is carrying on an unlawful trade, or intercourse, with the enemy." (The letter also appears at 28 Annals of Congress 757-761.

After the War of 1812 was declared (Act of June 18, 1812, ch. 102, 2 Stat. 755) the customs system was disrupted by the British Navy so that a system of internal revenue was imposed. The two main acts setting up the War of 1812 internal revenue system, the Act of July 22, 1813, ch. 16, 3 Stat. 22, and the Act of August 2, 1813, ch. 56, 3 Stat. 82 notably did **NOT** contain any § comparable to §32 of the 1791 Distilled Spirits Act. The result of Secretary Dallas' letter was the Act of March 3, 1815, ch. 100, 3 Stat. 239. (1815 Internal Revenue Act).

§10 of this Act reads:

"That if any collector or his deputy, shall have **cause to suspect** a concealment of any goods, wares, or merchandise, in respect to which the respective provisions of **the acts imposing an internal duty** thereon have not been complied with, in any **particular** Dwelling-house, store, building, or place, (other than the manufactory in which the same were made.) they, or either or them, shall, upon proper application on **oath** to any justice of the peace, be entitled to a **warrant** to enter such house, store, or place, (in the day time only,) and there to search for such goods; and, if any shall be found, to seize and secure the same for trial." 3 Stat. at 241. (emphasis added)

§13 of this Act contains in relevant part:

"the onus probandi shall be on the claimant only when **probable cause** is shown for such prosecution, to be judged of by the court before whom the prosecution is had." 3 Stat. at 242 (emphasis added).

§16 of this Act reads:

"That the foregoing provisions of this act shall be applicable, in all respects, as well to all acts that may hereafter be passed, relative to internal duties, as to those heretofore passed and now in force." 3 Stat, at 243.

SEARCH WARRANTS IN PRE-1776 REVENUE ACTS OF PARLIAMENT

Petitioner Johnston respectfully submits that the following search warrant sections of various revenue related pre-1776 Acts of Parliament plainly show that the Fourth Amendment applies to **all** revenue searches and seizures.

§1 of 12 Car. 2, c. 19 (166), 3 Ruff. 185, 5 SR 250 reads in relevant part:

> "That if any Person or Persons at any time [after September 1, 1660], shall cause any Goods for Custom, Subsidy or other Duties are due and payable by virtue of [12 Car. 2, c. 4(1660)] to be landed or conveyed away without due Entry thereof first made, and the Customer or Collector, or his Deputy agreed with; That then and in such Case, **upon Oath** thereof made before the Lord Treasurer, or any of the Barons of the Exchequer, or Chief Magisteate of the Port or place where the Offence shall be committed, or the Place next adjoining thereunto, it shall be lawful to and for the Lord Treasurer, or any of the Barons aforesaid, or Chief Magistrate or the Port or Place where the Offence shall be committed, or the Place next adjoining thereunto, to issue out a **Warrant** to any Person or Persons, thereby enabling him or them with the **As sistance** or a Sheriff, Justice of the Peace or Constable, to en ter into any House in the Day-time where such Goods are suspected to be concealed; and in the case of Resistance to break open such Houses, and to seize and secure the same Goods so concealed; and all Officers and Ministers of Justice are hereby required to be aiding and assisting there unto," 3 Ruff, at 185-186, 5 SR, at 250 (emphasis Added).

§5(2) of 13 and 14 Car. 2, c. 11 (1662) reads:

> "And it shall be lawful to or for any Person or Persons, auth orised by Writ of Assistance under the Seal of his Majesty's Court of Exchequer, to take a Constable, Headborough or other publick Officer inhabiting near unto the Place, and in case of Resistance, to break open Doors, Chests, Trunks and other Package, there to Seize, and from thence to bring, any Kind of Goods or Merchandise whatsoever, prohibited and uncustomed, and to put and secure the same in his Majesty's Store-house, in the Port next to the Place where such Seizure

shall be made." 3 Ruff. 236, 237; 5 SR 393, 394 (in §4).

In §6 of 7 and 8 Wil. 3, c. 22 (1696) there is the following relevant language:

"And that the Officers for collecting and managing his Majesty's Revenues, and inspecting the Plantation Trade, in any of the ***Plantations [in America], shall have the same Powers and Authorities *** as are provided for the Officers of the Customs in England by [13 and 14 Car.2, c. 11 (1662)] *** to enter Houses or Warehouses, to search for and seize any [Prohibited or uncustomed goods] ***." 3 Ruff 608, 611; 7 SR 103, 104 (in §5).

§6 of 19 and 20 Car.2, c. 6 (1667-1668) reads in relevant part:

"And in case any such Retailer shall refuse oppose or resist the persons appointed to search as aforesaid or shall not discover declare or show to them all such Cellars Vaults Store cellars Warehouses Shops Roomes or other Places wherein he or they have any Wines or other the Liquors aforesaid lying or remaining for their use that then upon **Oath** thereof made before the Mayor or other cheife Magistrate of any City Borought or Town corporate or any Justice of the Peace of the County City or Place where such Offence shall be committed (which **Oath** they are hereby authorised and required to administer) it shall and may be lawfull to and for any such cheife Magistrate or Justice of the Peace and they are hereby required **to issue out a Warrant** to the person or persons so complaining thereby to enable him or them with **the assistance** of a Constable or other like Officer of the Place where such offence shall be committed to enter in the day time into the House or Houses of any such Retailer or into any other Room Cellar or place which att any time during the continuance of this Act shall be in such Retailers Occupation for the laying in of Wines or other the Liquors aforesaid And in the case of resistance to breake open any Doors and to search for any Wines or the Liquors aforesaid soe concealed or not discovered and to seize and secure the same And all Constables and other Officers aforesaid are hereby authorized and required to be aiding and **assisting** thereunto" (original spelling) (emphasis added) 5 SR 630, 631-632.

§7 of 10 Wil.3, c.4 (1698) reads in relevant part:

"That in the case of Gaugers or Officers of Excise, or any of them, **shall know, or have cause to suspect** any such private

or concealed Still, Back or other Vessel, Spirits, Low Wines, Wash, or other Materials preparing for Distillation, to be set up or kept in any House or Place, and shall make **Affidavit** before one or more Justice or Justices of the Peace for the County or Place where he **shall so know or suspect such private** or concealed Still, Back, or other Vessel, Spirits, Low Wines, or Materials preparing for Distillation, are or shall be so set up or kept, and shall in **such Affidavit declare the Grounds of such his Knowledge or Suspicion,** then and in such Case, it shall and may be lawful for such Officer or Officers, in the Day-time, and in the Presence of a Constable, or other lawful Officer of the Peace (who are hereby required to be **aiding and assisting** therein) **by Warrant** from such Justice or Justices of the Peace before whom such **Affidavit** shall be made, to be directed to such to Officer or Officers of Excise (which **Warrant** the said Justice or Justices of the Peace are hereby authorized and required to grant) to break open the Door, or any Part of such House or Place, [illegible] to seize all such Stills, Backs, or other Vessels, and also all such Spirits, Low Wines, Wash, or other Materials for Distillation that shall be found therein, and to detain and keep the same in such House or ther Place where he or they shall find the same so kept private or concealed; ***" 4 Ruff, 3, 4; 7 SR 456, 457 (emphasis added)

§98 of 10 Ann, c. 19 (1711) reads:

"That at any Time or Times, during the Continuance of this Act, **upon Oath** made by any credible Person or Persons, that he, she, or they **have reason to suspect or believe,** that any printed, painted, stained, or dyed Silke, Callicoes, Linens, or Stuffs, as aforesaid, for which a Duty ought to have been paid or charged by this Act, are or shall be in the Custody or Possession of any Draper, or other Person or Persons trading or dealing therein, or of any Person or Persons, for the use or Account of such Draper, or other Trader or Dealer, for Sale, without having thereupon such Marks or Stamps as are by this Act required, to denote the Payment or Charging to the said Duties thereupon; it shall and may be lawful to and for the Commissioners, who shall be appointed for the said Duties upon Silks, Callicoes, Linens, or Stuffs, printed, painted, stained, or dyed in Great Britain, or the major Part of them, within the Limits of the Weekly Bills of Moratality, or any two Justices of the Peace in any other Parts of the

Kingdom of Great Britian, from time to time, to issue their respective **Warrants or Orders**, thereby authorizing and requiring any Officer or Officers for the same Duties (with the **Assistance** of a Constable, or other Officers of the Peace) in the Day-time, to search for the same, and to open Doors, Chests, Trunks, and Package, and to seize such Goods, and to bring them to the Office for the said Duties next to the Place where they shall be so seized, in order to a futher Proceeding thereupon according to this Act; and that every such **Warrant and Order** shall and may be obeyed and executed accordingly." 4 Ruff. 534, 553, 9 SR 595, 615-616 (as §103 of 10 Ann, c. 18) (emphasis added).

§59 of 6 Geo. 1, c. 21 (1719) reads in relevant part:

"That in case the Commissioners for the Time being for managing the Stamp-Duties shall be informed, or have Cause to suspect, that any Person or Persons do make or cause to be made any playing Cards or Dice, in any House or Place whatsoever in Great Britain, without sending or giving Notice thereof in Writing to the said Commissioners at their Head Office, and **Affidavit** being made thereof by the Person or Persons so informing or giving Notice, before one or more Justice or Justices of the Peace for the County or Place where such Cards or Dice shall be making or made, **declaring the Grounds of his or their Knowledge or Suspicion**, that then and in such Case it shall and may be lawful for any Officer or Officers employed by or acting under the said Commissioners in the Management of the Duties on playing Cards and Dice, in the Day-time, and in the Presence of a Constable or other lawful Officer of the Peace (who is hereby required to be **Aiding and assisting** therein) by **Warrant** from such Justice or Justices of the Peace before whom such **Affidavit** shall be made, to be directed to such Officer or Officers as aforesaid (which **Warrant** the said Justice or Justices of the Peace are hereby authorized and required to grant) to break open the Door, or any Part of such House or Place where any such Cards or Dice are so, as aforesaid, suspected to be so made or making; and to enter into such House or Place, and to seize all such Cards, Dice Tools or Materials with which they are made or making, that shall be then and there found, and to detain and keep the same in such House and Place as the said Commissioners shall direct or appoint;***" 5 Ruff 311, 323 (emphasis added).

§2 of 11 Geo. 1, c. 30 (1724) reads in relevant part:

"That in case any Officer or Officers for the said Duty or Excise shall have **Cause to suspect** that any foreign Brandy, Arrack, Rum, Spirits or Strong Waters shall be fraudulently hid or concealed in any Place whatsoever, either entred for keeping the same as aforesaid, or not entred, with an Intent to defraud his Majesty of the Duties thereon; then and in such Case, if such Place shall be within the Cities of London or Westminster, or within the Limits of the Weekly Bills of Mortality, **upon Oath** made by such Officer or Officers before the Commissioners of Excise for the Time being, or any two or more of them or in case the same shall be in any other Part of Great Britain, **upon Oath** made by such Officer or Officers before one or more Justice or Justices of the Peace for the County, Riding, Divisions or Place, where such Officer or Officers shall **suspect the same** to be hid or concealed, setting forth the **Ground of his or their Suspicion,** it shall and may be lawful to andfor the said Commissioners, or Justice or Justices of the Peace respectively, before whom such **Affidavit or Affidavits** shall be made, if he or they shall judge it reasonable, by **Special Warrant or Warrants** under his and their respective Hands and Seals, to authorize and impower such Officer or Officers by Day or by Night, but if in the Nighttime in the Presence of a Constable or other lawful Officer of the Peace, to enter into all and every such Place or Places where he or they shall so suspect such foreign Brandy, Arrack, Rum, Spirits or Strong Waters shall be so fraudulently hid or concealed, and seize and carry away all such foreign Brandy, Spirits or Strong Waters, which he or they shall then and there find so fraudulently hid and concealed, as forfeited, together with all the Casks or other Vessels and Things wherein the same shall be contained;***5 Ruff. 548, 549 (emphasis added).

ARGUMENT II

In view of the fact that the government has commenced six separate "summons" enforcement proceedings, petitioner respectfully submits that 28 USC §1927 has been violated. See *Roadway Express v. Piper* —U.S.—, 48 U.S. Law Week 4836 (1980).

ARGUMENT CONCLUSION

Petitioner most respectfully submits that it is only because of the fact that this Honorable Court is **NOT** aware of Fourth Amendment research cited in this petition, that the entire subject of bad faith activities on the part of the IRS has arisen.

W H E R E F O R E petitioner believes that what is presented here is so substantial as to require this Honorable Court to order briefs on the merits and oral arguments to review not only the action of the courts below, but the research herein cited, she prays that a Writ of Certiorari will issue.

Most Respectfully Submitted,

Lynn Johnston

Miss Lynn Johnston
Petitioner pro se

The 16th of July, 1980

AFFIDAVIT pursuant to Rule 28.5(c)

Lynn Johnston, after being duly sworn, deposes and says that she served the required number of copies of her Petition for Certiorari upon:

The Solicitor General (4 copies by air mail)
U.S. Department of Justice
Washington, D.C. 20530
Attention Gilbert E. Andrews, (Chief Appellate Section
Ref. MCF: GEA: WAWhitledge: jp 5-38-635 5-38-636 5-37-3714

Attorney Marley Weiss (3 copies)
8000 E. Jefferson Avenue
Detroit, Michigan 48214

Ann Arbor Co-op Credit Union (3 copies)
Manager Leo Murry
2033 W. Stadium Blvd.
Ann Arbor, Michigan 48103

Attorney Margaret Schilt (3 copies)
500 City Center Building
Ann Arbor, Michigan 48104

by placing said documents into sealed packages with sufficient first class postage affixed thereon and depositing them into the U.S. Mails located in Ann Arbor, Michigan.

Dated: July 4, 1980 Lynn Johnston

Lynn Johnston
13325 Unadilla Road
Unadilla, Michigan 48137

Subscribed and sworn to before me a Notary Public:

David W. Franklin

DAVID W. FRANKLIN
Notary Public, Washtenaw County, Mich.
My Commission Expires April 9, 1984

My commission expires:

APPENDIX

Nos. 79-1652/3/4

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA AND JAMES F. DOWLING, SPECIAL AGENT, INTERNAL REVENUE SERVICE,	)	
Petitioners-Appellees,	)	
v.	)	ORDER
FEMINIST FEDERAL CREDIT UNION (79-1652), ANN ARBOR CO-OP CREDIT UNION (79-1653), HURON VALLEY NATIONAL BANK (79-1654),	)	
Respondents-Appellees	)	
LYNN JOHNSTON,	)	
Proposed Intervenor-Appellant	)	

BEFORE: KENNEDY, MARTIN and JONES, Circuit Judges

This cause is before the Court on appellees' motion to remand these three consolidated appeals to allow the district courts to correct certain procedural defects in the proceedings below.

Upon consideration of the record, appellees' motion and appellant's response and brief, the Court concludes that a remand is unnecessary.

Upon further consideration, the Court finds that the questions on which the decision of this cause depends are so unsubstantial as not to require further argument. Rule 34(a), Federal Rules of Appellate Procedure.

Appellant appeals from three district court orders enforcing Internal Revenue Service summonses against respondent financial institutions following hearings in which appellant was permitted to intervene. In challenging enforcement of the summonses appellant argued that they violated the Fourth Amend-

ment as they were not based on probable cause. Appellant also claims that the investigation is being undertaken in bad faith.

It is clearly established that the Internal Revenue Service need not establish probable cause in order to obtain enforcement of a summons. *United States v. Powell,* 379 U.S. 48 (1964). Further, the Fourth Amendment rights of a taxpayer are not involved when a summons is issued to a third party. *Donaldson v. United States,* 400 U.S. 517 (1971); *United States v. Stuart,* 587 F.2d 929 (8th Cir. 1978).

The Court also concludes that appellant did not carry her heavy burden of showing an abuse of process. A claim that appellant is being investigated because she is a tax protester does not prove bad faith, since appellant did not allege that non-protesters were not also prosecuted for violations of the federal tax law. *United States v. Silkman,* 543 F.2d 1218 (8th Cir. 1976). Also appellant's charge that the investigation was solely for the purpose of filing criminal charges was successfully rebutted by the government. *United States v. LaSalle National Bank,* 437 U.S. 298 (1977). The finding that a legitimate, on-going civil investigation is being pursued is not clearly erroneous. Accordingly,

It is ORDERED that the motion to remand be denied. It is further ORDERED that the judgments of the district courts be, and they hereby are, affirmed. Rule 9(d)3, Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

_____

Clerk

ISSUED AS MANDATE: June 23, 1980
COSTS: NONE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA and
JAMES F. DOWLING, Special Agent,
Internal Revenue Service,

Petitioners,

v.

Civil Action
No. 79-72645

ANN ARBOR CO-OP CREDIT UNION,
a Michigan State Chartered Credit
Union, 2023 West Stadium Blvd.,
Ann Arbor, Michigan 48103,

Respondent.

_____/

ORDER

As part of an investigation into potential tax liabilities of Ms. Lynn D. Johnston, the Internal Revenue Service, through its special agent, James F. Dowling, requested certain records kept by defendant credit union pertaining to financial activities of Ms. Johnston. As was her right, Ms. Johnston told the credit union not to comply with the request.

In order to obtain the records, the Internal Revenue Service then asked this court to order the credit union to turn the records over. The court ordered the credit union to show cause why it should not turn the records in question over to the Internal Revenue Service. On July 30, Ms. Johnston filed a motion to intervene. On August 7, before this court had knowledge of Ms. Johnston's motion, it entered an order based on the stipulation of the government and the credit union. Because of Ms. Johnston's interest in this case and in order to permit her to take part, her motion to intervene was granted and the August 7 order was set aside, both in open court.

Johnston argues that the IRS summons, is not a summons should not be enforced because (1) it is not based on probable cause, and (2) the investigation is being undertaken in bad faith.

The IRS points out that it "need not meet any standard of probable cause to obtain enforcement" of its summons. *United States v. Powell,* 379 U.S. 48 (1964).

In her argument on bad faith Ms. Johnston offers evidence only of the fact that she is under investigation for possible criminal liability. The United States Supreme Court has made it quite clear that unless she can prove that there is not also a legitimate, ongoing civil investigation, there is nothing about a criminal investigation that ingests bad faith into the request for the records. *United States v. LaSalle National Bank,* 437 U.S. 298 (1977).

For these reasons, and because the Ann Arbor Co-Op Credit Union has stipulated to the order of compliance with the IRS summons in question, it is hereby ordered and adjudged that the respondent, the Ann Arbor Co-Op Credit Union, shall comply with and obey the summons served upon it on December 16, 1978 and each and every requirement thereby by:

A. Immediately presenting to petitioners true and accurate copies of only those documents which are readily available and accessible for the purposes of production and copying as same pertain to Lynn D. Johnston for the period of 1975-77, if any, and further

B. Subsequently making available to the petitioners any and all other record and document repositories those portions pertaining to Lynn D. Johnston for the period 1975-77, if any, for purposes of inspection and copying at petitioners' expense should the documents provided by Section 1(a) above be deemed insufficient by the petitioners.

So ordered.

/s/

CHARLES W. JOINER
United States District Judge

Dated: September 5, 1979
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA and
JAMES F. DOWLING, Special Agent,
Internal Revenue Service,

Petitioners,

v.

Civil Action
No. 79-72645

ANN ARBOR CO-OP CREDIT UNION,
a Michigan State Chartered Credit
Union, 2023 West Stadium Blvd.,
Ann Arbor, Michigan 48103,

Respondent

and

LYNN D. JOHNSTON,

Intervenor.

JUDGMENT

The petition to enforce Internal Revenue Service summons came on for hearing before the court, the Honorable Charles W. Joiner, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered on September 5, 1979,

IT IS ORDERED AND ADJUDGED that the Summons be enforced.

Dated at Detroit, Michigan, this 5th day of September, 1979.

John P. Mayer
Clerk of the Court

by /s/_____
Deputy Clerk

Approved as to form:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA and
JAMES F. DOWLING, Special Agent,
Internal Revenue Service,
—vs— PETITIONERS, **Civil Action No. 9-72644**
FEMINIST FEDERAL CREDIT UNION,
21500 Greenfield, **Judge Robert E. DeMascio**
Oak Park, Michigan 48237
Respondent.

ORDER OF COMPLIANCE

At a session of said Court held in the Federal Building and U.S. Courthouse in Detroit, Michigan on Aug. 27, 1979.

PRESENT: **Honorable Robert E. DeMascio** United States District Judge

Upon the STIPULATION FOR ENTRY OF ORDER OF COMPLIANCE AND ORDER OF DISMISSAL AS TO RESPONDENT FEMINIST FEDERAL CREDIT UNION executed by representatives of these Petitioners and the Respondent Feminist Federal Credit Union as filed with this Court, it is hereby

ORDERED AND ADJUDGED that the Respondent, the Feminist Federal Credit Union, shall comply with and obey the Summons served upon it on November 16, 1978 and each and every requirement thereby by

A. Immediately presenting to Petitioners true and accurate copies of only those documents which are readily available and accessible for the purposes of production and copying as same pertain to Lynn D. Johnston for the period 1975-1977, if any, and further

B. Subsequently making available to the Petitioners any and all other record and document repositories those portions pertaining to Lynn D. Johnston for the period 1975-1977, if any, for purposes of inspection and copying at Petitioner's expense should the documents provided by Section 1(a) above be deemed insufficient by the Petitioners.

Honorable Robert E. DeMascio

Notice of Presentment Is Hereby Waived

Dated: August 27, 1979

MARLEY S. WEISS (P24513)
Attorney for Respondent

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
et al.,
PETITIONERS,

v. **Civil No. 972658**

HURON VALLEY NATIONAL BANK,
Respondent.

ORDER OF COMPLIANCE

Upon the stipulation for entry of order of compliance and order of dismissal as to respondent Huron Valley National Bank executed by representatives of these petitioners and the respondent Huron Valley National Bank as filed with this court, it is

ORDERED AND ADJUDGED that the respondent shall comply with and obey the summons served upon it on November 16, 1978 and each and every requirement thereby by

a. Immediately presenting to petitioners true and accurate copies of only those documents which are readily available and accessible for the purposes of production and copying as same pertain to Lynn D. Johnston for the period 1975-1977, if any, and further

b. Subsequently making available to the petitioners any and all other record and document repositories those portions pertaining to Lynn D. Johnston for the period 1975-1977, if any, for purposes of inspection and copying at petitioners' expense should the documents provided by Section 1(a) above be deemed insufficient by the petitioners.

Robert E. DeMascio
United States District Judge

Dated: September 13, 1979

PURSUANT TO RULE 77(d), FED. R. CIV. P. COPIES HAVE BEEN MAILED TO THE FOLLOWING:

Samuel Behringer, AUSA
ON Sep. 13, 1979,

Sherry Stamps
DEPUTY COURT CLERK